The governing principle is, rather, that of *Harper v. Virginia Department of Taxation*, *supra*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97. This case was still open on direct review when *Virginia v. Black* and *Scheidler v. National Organization for Women, Inc.* were decided. In refusing to reconsider on the basis of those decisions, then, the Ninth Circuit did exactly what this Court in *Harper* declared the federal courts must not do: permit the substantive law to shift and spring from party to party and case to case. *Id.*

The Ninth Circuit did the same thing on the RICO aspect of the case as on the FACE Act/true-threat aspect. The RICO Act relates to "racketeering activity," 18 U.S.C.A. § 1961(1), and in the long listing of the various offenses that fall under that heading—offenses as diverse as pension and welfare fund fraud and peonage, slavery and trafficking in persons—the only one which even colorably bears upon the petitioners' conduct is that "relating to . . . extortion," with reference made to 18 U.S.C.A. § 1951: the Hobbs

---

gued that none of the defendants' challenges, including that pertaining to the intent requirement of a "true threat," merited review. 422 F.3d at 966. The inference drawn by the Court of Appeals was, apparently, that this Court's consideration of the Solicitor General's submission and its denial of *certiorari* constituted some sort of quasi-adjudication on the merits.

Any such inference is, of course, foreclosed by the general rule to the contrary, *see Missouri v. Jenkins*, *supra*, but it also is specifically negated by the action of this Court the very next term in *Virginia v. Black*. There this Court expressly held that there must be "a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," 538 U.S. at 359, thereby repudiating the Solicitor General's prior contention. Plainly, then, the denial of *certiorari* could not have been, and in any event as a matter of law was not, *Missouri v. Jenkins*, an adjudication on the merits of the true-threat intent question.

Act. The plaintiffs in point of fact allude to extortion in their complaint. Amended Complaint, Paragraph 93. Yet the Hobbs Act defines "extortion" as "the *obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right," 18 U.S.C.A. § 1951(b)(2) (emphasis added), and, given this narrowly-demanding language, one must question whether as a matter of law an extortion theory was arguably viable even a decade ago when the complaint was filed. As of 2003, however, with the decision of this Court in *Scheidler v. National Organization for Women, Inc.*, *supra*, there was and is no question that it was and is not.

In deciding *Scheidler*, this Court noted the specific requirement of the Hobbs Act that a person must "obtain" property from another party to commit extortion. 537 U.S. at 404. There was no dispute that those defendants interfered with, disrupted and in some instances completely deprived those plaintiffs of their ability to exercise their property rights; in fact, it was acknowledged by counsel that certain aspects of his clients' conduct were criminal. *Id.*

> But even when their acts of interference and disruption achieved their ultimate goal of "shutting down" a clinic that performed abortions, such acts did not constitute extortion because petitioners did not "obtain" respondents' property. Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property.

Id. at 404–405. To conclude that such actions constituted extortion would, Chief Justice Rehnquist wrote, "effectively discard the statutory requirement that property must be obtained from another, replacing it instead with the notion that merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405. It would also eliminate the recognized distinction between extortion and

the separate crime of coercion. *Id.* The Hobbs Act carefully defines its key terms, and therefore this Court was equally careful in making certain that the definitional distinctions were observed. *Id.* at 407–408. This Court has continued its analytical precision in its recent decision in the same litigation holding that threatening or committing physical violence that is unrelated to extortion or robbery falls outside the scope of the statute. *Scheidler v. National Organization for Women, Inc.*, ___ U.S. ____, 2006 WL 461512 (2006).

Yet the Ninth Circuit refused outright to apply *Scheidler* to the RICO Act aspect. As with *Virginia v. Black* and the FACE Act true-threat intent requirement, it "could not go there," *PPCW VIII*, *supra*, 422 F.3d at 966—even though it was *obligated* to go there by *Harper v. Virginia Department of Taxation*. The Court of Appeals' casual disregard of both of these Supreme Court precedents was bad enough—injunctive restraint on their First Amendment liberty and a $16,000,000 liability in damages—for the petitioners, but the impact is comparably bad for many others, this *amicus* included and the persons it represents. The *raison d'etre* for the Life Legal Defense Foundation, as set forth in its mission statement, is:

> [t]o give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. LLDF will accomplish its mission and purpose through the law and education.

Supporting the advocates of unborn children inside the courtroom plainly includes knowing what to tell them outside the courtroom about the state of the law and their potential liability should a court deem them to have violated it. Yet LLDF at this point has no way of knowing what the law is in the Ninth Circuit and no way of knowing what to tell its clients. When a pro-life advocate approaches an LLDF attorney and inquires what tactics he or she may

lawfully employ in publicizing a doctor who kills the unborn, counsel will not know what to say. With respect, certainly, to the legal character of a "threat" under the FACE Act, counsel can tell the client that this Court in *Virginia v. Black* held, albeit in a wholly different statutory context, that there must be a "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," but counsel must also tell the client that in the Ninth Circuit that authoritative holding is "not always adhered to in our cases. . . ." The attorney can similarly advise the client that under precedents of this Court "debate on public issues should be uninhibited, robust, and wide open, . . . vehement, caustic, and sometimes unpleasantly sharp. . . ," *Watts v. United States*, 394 U.S. 705, 708 (1969), but that in the Ninth Circuit publicizing an abortion-providing doctor can be a "true threat," not because the activist "necessarily intend[ed] to hurt or kill these particular providers," but "because of [a] pattern of previous violence" engaged in by other, unrelated people and because he or she might "reasonably foresee" that identifying the physicians would be interpreted as a serious expression of intent to harm. *PPCW VIII*, *supra*, 422 F.3d at 958–59. And, with respect to the potential for being found a "racketeer" under RICO, the attorney can tell the pro-life activist that, yes, the Supreme Court has held the activities in question not to be "extortion" and therefore not subject to liability, but that in the Ninth Circuit liability in the many millions of dollars has been imposed nonetheless. Should the non-lawyer activist thereupon observe that he or she, with lay naivete, had always thought the Supreme Court had the last word on such matters, counsel will be able to do no more than shrug.

Attorneys need to know what to tell clients. Clients need to know what they may and may not do under the law. Above all, the law—in particular, the First Amendment as applied to statutes such as the FACE and RICO Acts—must be

read to provide the "breathing space" that liberty requires. *National Association for the Advancement of Colored People v. Button*, 371 U.S. at 433. There is no breathing space here. This Court should grant *certiorari* and then reverse.

CONCLUSION

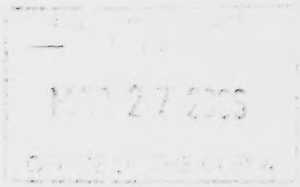
It is therefore respectfully submitted that for these reasons this Court should grant the petition for *certiorari* and then reverse the final judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Catherine W. Short
Counsel of Record

Attorney for Amicus
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558
(707) 224-6675

March 27, 2006



Case No. 05-1083

In The
Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

---

BRIEF OF AMICUS CURIAE, PAUL dePARRIE, IN SUPPORT OF PETITION

DINA VITTORIA CELLINI
Counsel of Record
(Admission pending)
211 Bal Cross Drive
Bal Harbour, FL 33154
305-308-4668

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Statement of the Case 4

Reasons for Granting the Petition 4

I. The Ninth Circuit's 6-5 affirmance of a plainly unconstitutional verdict and injunction is a direct attack on freedom of the press for amicus and all similarly situated commentators and activists 4

II. The Ninth Circuit has abandoned any pretext of protecting controversial speech 7

III. The Ninth Circuit has imposed an indiscernible standard for pro-life speech and journalism 9

IV. The Ninth Circuit has effectively outlawed a classic form of political activism 12

Conclusion 16

TABLE OF AUTHORITIES

CASES

Brandenberg v. Ohio,
395 US 444 (1968) 8

Coates v. Cincinnati,
402 US 611 (1971) 10

Connally v. General Construction Co.,
269 US 385 (1926) 10

Frisby v. Schultz,
487 US 474 (1988) 4

Grayned v. City of Rockford,
408 US 104 (1972) 10

Hanzo v. deParrie,
953 P2d 1130 (Or. Ct. App. 1998) 2, 15

Lawson v. Murray,
515 US 1110 (1995) 9

NAACP v. Claiborne Hardware,
458 US 886 (1982) 9

New York Times v. Sullivan,
376 U.S. 254 (1964) 4

New York Times Co. v. US,
403 US 714 (1971) 5

Terminiello v. Chicago,
337 US 1 (1949) 9

US v. Twine,
853 F2d 676 (9th Cir. 1988)..... 13

CONSTITUTIONAL PROVISION

U.S. Constitution, First Amendment..... passim

RULES

Supreme Court Rule 37..... 1

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, Paul deParrie ("deParrie") hereby submits this *amicus curiae* brief in support of the Petition For Writ Of Certiorari ("Petition") filed by Petitioners American Coalition of Life Activists ("ACLA") et. al.[1] DeParrie has a unique role in this case and appeared as an *amicus* in this matter before the three-judge panel, the *en banc* panel of the Ninth Circuit, and before this Court in the first Petition for Writ of Certiorari, Case No. 02-563.[2] After the decision of the *en banc* panel ("Majority Opinion") this case was again brought before the Ninth Circuit which deemed the only relevant issue before it to be the punitive damages award. That panel did not address deParrie's First Amendment issues.

DeParrie was editor-in-chief of *Life Advocate* magazine for ten years because he felt that it provided the best forum for his writer/journalism vocation and his public activism. (Trial Tr. 2813-14) The magazine covered a wide range of news and commentary on national and international issues, much of which was written by deParrie himself. (Trial Tr. 2813-14) *Life Advocate* magazine was destroyed by this litigation. (deP. Rep. Br. p. 7)

---

[1] Counsel for Petitioners and Respondents have consented to the filing of this brief. Their written consent was filed with this Court simultaneous with the filing of this brief. This brief was not authored, in whole or in part, by counsel for any party. King Lithographers, Inc. has made a monetary contribution towards the printing of this brief.

[2] DeParrie originally filed in the Ninth Circuit as a *pro se* appellant-non-party-in-interest. After filing both an opening brief and a reply brief, the three judge panel treated deParrie as *amicus curiae*. His briefs filed with the Ninth Circuit will be cited herein as "deP. Op. Br." and "deP. Rep. Br." "App." as used herein refers to the Appendix of the Petition.

DeParrie has two distinct First Amendment interests in this case: First, deParrie is a published author and journalist. In fact, he was credentialed as a journalist by the District Court in this very action so that he could cover the trial for *Life Advocate* magazine (Lodging, p. 1 or "L 1").[3] One of his news stories about the "wanted-style" posters was classified as a "republication" of a true threat by the District Court. (L 2-9)

Second, deParrie is political activist in the pro-life field, much of whose past activism was conducted under the auspices of a defendant in this action, Advocates for Life Ministries ("ALM"), a federally tax-exempt nonprofit organization that has also been destroyed by this litigation. ALM was, in turn, associated with petitioner ACLA, an unincorporated association of pro-life activist groups and individuals. ACLA, as an activist organization, has also been destroyed. DeParrie has designed and distributed pro-life posters both before and after the alleged "poster pattern" theory was created for this case. Many of them are more confrontational in nature than those at issue in this case (L 12-23) and, yet, the Oregon Court of Appeals has deemed those other posters to be protected speech. *Hanzo v. deParrie*, 953 P.2d 1130 (Or. Ct. App. 1998).

The District Court verdict and injunction entered in 1999 ("Order") poses serious problems for deParrie in both his individual capacity and as editor- in –chief of *Life*

---

[3] DeParrie has filed a request with this Court to accept a Lodging containing 67 pages. The Lodging consists primarily of depictions of posters and news articles which are repeatedly referred to in this brief. This same lodging was accepted by this Court in the first Petition for Writ of Certiorari, Case No. 02-563. Lodging pages are designated by "L". Lodgings are in 8 ½" x 11" format as reduction would render many of them illegible.

Advocate magazine. First, in contravention of basic due process rights, deParrie was enjoined by name in the Order even though he was not a party to the case and then denied standing as an appellant in the Ninth Circuit. Like the Petitioners, deParrie is therefore enjoined from publishing, republishing or even *possessing* copies of the subject posters and website content, or their undefined "equivalent," and he is also prohibited from publishing, republishing or merely possessing "personally identifying information" about any of the respondents. (App. pp. 281-85, 289-92). Second, the jury imposed aggregate damages of $120 million dollars against the defendants below, in part, because of an article that deParrie wrote in *Life Advocate* about a poster. (deP. Rep. Br. p. 7).

Thus, deParrie could in the future be subjected to contempt citations and even imprisonment under the Order, along with massive damage claims, for basic First Amendment activity that would never be questioned in any other context. But for deParrie's viewpoint, his First Amendment rights would be honored. The Ninth Circuit en banc Majority Opinion imperils the personal and professional life of anyone courageous enough to 1) publish articles or distribute protest literature condemning any of the respondents, 2) for anything construed as "republication" of the posters or their "equivalent", or 3) for publishing anything deemed to qualify as "personally identifying information" about any of the respondents.

For these compelling personal and professional reasons, deParrie now appears in support of the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

DeParrie hereby adopts and incorporates by reference the Statement of the Case presented in the Petition for Writ of Certiorari. Additional facts relevant to deParrie's interest are discussed in the context of specific issues below.

REASONS FOR GRANTING THE PETITION

This Court has previously reviewed First Amendment restrictions when "the question presented [was] of substantial importance." *Frisby v. Schultz*, 487 US 474, 479 (1988). The ominous threats to both free speech and freedom of the press resulting from the Ninth Circuit en banc Majority Opinion in this case present questions equally important to justify the writ of certiorari.

The actual effect of the harms which the Ninth Circuit finds acceptable to legitimate First Amendment interests are discussed below from the perspective of an activist/ journalist.

I.
The Ninth Circuit's 6-5 affirmance of a plainly unconstitutional verdict and injunction is a direct attack on freedom of the press for amicus and all similarly situated commentators and activists

As this Court explained in *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964), freedom of expression upon public questions is constitutionally safeguarded "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." As such, "'Any system of prior restraints of expression comes to this court bearing a heavy presumption against its constitutional validity.' The Government 'thus carries a

heavy burden of showing justification for the imposition of such a restraint.'" *New York Times Co. v. US*, 403 US 714, 714 (1971) (citations omitted). "Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints." *Id.* at 717.

These principles were frontally attacked when the Ninth Circuit en banc majority reversed the first three-judge panel. Even *responsible* coverage of an important and hotly debated national political issue is no longer safe.

For instance, after Michael Griffin shot abortionist David Gunn in 1993 and a debate arose over the moral legitimacy of the use of force to stop abortions, *Life Advocate* magazine provided a forum for the best commentaries on both sides of the issue. Even when the magazine took an editorial position some months later, deParrie, as editor-in-chief, insured that all sides continued to get equal coverage. In fact, the balance went slightly to those opposed to the use of force. (dcP, Op. Br. p. 67) Such debates were a singularly important component of this nationally-circulated magazine.

The March 1995 issue of *Life Advocate* magazine includes, besides the story about the poster and other ACLA activities in Washington, D.C. during the *Roe v. Wade* anniversary, some twenty one other news stories, fourteen letters to the editor, five commentaries, four cartoons, five "quotable quotes," and one photo essay.[4] It is nothing short of incredible that a federal appellate court could consider that article to be a "re[illegible]publication" of a "true threat," punished

[4] None of this was allowed to reach the jury as "content."

with a massive damage award and banned by injunction under pain of contempt of court and criminal prosecution under FACE.

The magazine's news coverage of the ACLA events held on January 25, 1995, the anniversary of *Roe v. Wade*, included a story about an ACLA picket held at Foundry Methodist Church, where then-President Bill Clinton was attending services,[5] a protest at the offices of the Health and Human Services against fetal experimentation, a candlelight vigil conducted in front of an abortionist's house, as well as the controversy over the release of the "Deadly Dozen" poster. (L 2-9) Sidebar stories included information on the annual March for Life, the introduction of the ACLA as a group, an anti-abortion group from Ireland whose members came to join the activities in Washington, D.C., and a simple columnar list of the abortionists listed in the "Deadly Dozen" poster.[6] (L 9) *Neither the poster itself, nor any actual representation of it, appeared in the magazine.*

True freedom of the press ended with the verdict and the Order. Not only had the posters themselves been declared "true threats," but the news story about one of the posters (the "Deadly Dozen" poster condemning 13 named abortion doctors), largely written and photographed by deParrie, was

[5] *The en banc majority made an issue of the "grim reaper" on the cover of the magazine. First of all, the magazine has much more content (as has been shown) than the ACLA "Deadly Dozen" material. Second, the picture is merely one of the protesters standing outside President Clinton's church. The reaper is holding a standard anti-abortion sign, but the photo was dramatic, so deParrie selected it for the cover. It had nothing to do with the "Deadly Dozen" poster.*

[6] While the names and some addresses of the abortionists were listed here, the sidebar about the ACLA listed the names and addresses of the ACLA's leaders as well (L 9).

deemed a "republication" of the poster and, thus, a "true threat." (L 2-9) Under the injunction, this *news article* was deemed a "true threat" when in the possession of any defendant or those in "active concert with them." (App. pp. 243, 289-92, 298-300) To comply with the Order, deParrie was forced to turn over to the district court even his personal family archive copy of the March 1995 issue of *Life Advocate* magazine. (deP. Rep. Br. p. 3)

The district court later ordered ALM to cease paying its bills (rent, electric, etc.) and put all financial assets in the ALM bank account and not remove them for any purpose. (deP. Rep. Br p. 7-8) As a result, ALM and *Life Advocate* magazine ceased to function, and deParrie lost his job.

Thus, as a journalist, deParrie has been prohibited by FACE and RICO from writing a *news story* which includes *information* contained in a poster. Even the publication in a news magazine of some of the *information* in the poster is construed as a "republication" of the "true threat." Worse yet, it is the *informational content* that deParrie described from the poster, not the poster *format*, that allegedly made deParrie's news story a "republication" of a "true threat".

The threat to a free press is simply unprecedented.

II.
The Ninth Circuit Majority has abandoned any pretext of protecting controversial speech

The en banc majority's "poster pattern" theory departs radically from this Court's teaching that free speech and free press advocacy is protected unless it incites imminent lawless action.

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenberg v. Ohio, 395 US 444, 447 (1968).

Here the en banc Majority Opinion evades a proper application of that precedent by inventing a new category of actionable speech: "threat" by remote temporal association with *past* violence, following the speech of persons *other than Petitioners*. The significance of Petitioners' explicit advocacy for *lawful* action to bring abortionists to justice was effectively disregarded in favor of a theory that has no precedent in American law, and which allowed a jury to impute to Petitioners a state of mind directly contrary to what they actually said.

The en banc Majority Opinion further undercuts the principle that free speech is best served when it is robust and even disturbing.

> *Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases.* An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. *When such appeals do not incite lawless action, they must be regarded as protected speech.* To rule otherwise would ignore the 'profound national commitment' that 'debate on public issues should be uninhibited, robust, and wide-open.